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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5491

TRIANTAFYLLOS KOTAKIS,

Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF CASE	4
REASON FOR GRANTING THE WRIT	9
CONCLUSION	13
APPENDIX A (Opinion of the Appellate Court of Illinois)	1a
APPENDIX B (Order of the Supreme Court of Illinois denying Petition for Leave to Appeal)	6a
APPENDIX C (Statutory Provisions Involved)	17a

LIST OF AUTHORITIES CITED

Cases

American Surety Co. of New York v. Coblentz, 381 F. 2d 185 (C.A. 5th, 1967)	12
Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., 415 F. 2d 403, 414 (5th Cir. 1969)	11

DeFonce Construction Co. v. City of Miami, 256 F. 2d 425 (U.S.C.A. 5, 1958) 12

Gunther v. San Diego & Arizona Eastern Railway Co., 382 U.S. 257, 261 11

Hunter v. Atchinson T & S. F. Ry. Co., 188 2d 294 (C.A. Ill. 1951) 13

Illinois Central R.R. Co. v. Whitehouse, 212 F. 2d 22 (C.A. Ill. 1954) 12

Kasper v. Kellar, 217 F. 2d 744 (U.S.C.A. 8, 1955) 12

Laday v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 422 F. 2d 1168, 1171 (7th Cir. 1970) 11

Missouri-Kansas-Texas R.R. Co. v. National Railroad Adjustment Bd., 128 F. Supp. 331 (D.C. Ill. 1954) 13

Swift & Co. v. U.S., 308 F. 2d 849 (C.A. 7, 1962) 9

Statutes

45 U.S.C., Section 153 First (q) 3, 8, 11

45 U.S.C., Section 153 First (J) 3, 12, 13

5th Amendment of the Constitution of the United States 3

Section 1 of the 14th Amendment of the Constitution of the United States 3

In The

Supreme Court of the United States

October Term, 1975

No.

TRIANTAFYLLOS KOTAKIS,

Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: *The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on July 11, 1975.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit has not been reported as yet.

JURISDICTION

The date of the Opinion of the United States Court of Appeals for the Seventh Circuit is July 11, 1975. This Petition is filed within 90 days from said date. Jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

I. Does an Award of the National Railroad Adjustment Board deny a railroad employee his right to procedural due process and equal protection of the laws where the Board imposes an arbitrarily high standard of proof.

II. Is an Award of the National Railroad Adjustment Board a nullity for the Board's failure to provide due notice to Petitioner of all hearings as required by the National Railroad Arbitration Act.

STATUTORY PROVISIONS INVOLVED

45 U.S.C., Section 153 First (q);
45 U.S.C., Section 153 First (J);
5th Amendment of the Constitution of the United States;
Section 1 of the 14th Amendment of the Constitution of the United States.

(See Appendix C)

STATEMENT OF CASE

Petitioner, was employed by the Respondent, Elgin, Joliet & Eastern Railway Co., from 1956 until October 1, 1970. He was a Greek immigrant having come to the United States during World War II. On September 30, 1970, his position as welder was abolished and he was to begin work as a grinder the following day.

On the afternoon of September 30, 1970, Petitioner accepted a ride in the automobile of a fellow employee of Greek nationality, Steve Krinakis, for the purpose of returning certain welding equipment to a welding shop some distance away. On the way, the automobile became over-heated and Mr. Krinakis stopped the car at the side of the road. While waiting for the car to cool off, the men noticed a large metal bearing weighing about 60 lbs., which the men picked up and while it was in their possession, were approached by Steel Company Security Guards and questioned. Petitioner being unable to converse in English, became confused and frightened, and left in order to find a Greek-American to act as interpreter. Upon his return about ten minutes later, Mr. Krinakis and the Security Guards were gone so he went home.

The following day, October 1, 1970, Petitioner and Mr. Krinakis were advised to report to the office of R. K. Dangremond, the Division Engineer of the Respondent Railroad, concerning charges of attempted theft of company property. Petitioner and Mr. Krinakis appeared before Mr. Dangremond at 10:00 a.m., and at this meeting two additional railroad officers were also present, Welding Supervisor Howard Lenhardt and Assistant Track Supervisor "Gus" Vorgias. Being fluent in

both English and Greek, Mr. Vorgias acted as interpreter and translated Mr. Dangremond's words from English to Greek. At the conclusion of the meeting, Petitioner and Krinakis signed resignations.

Petitioner claims that his resignation was involuntary and procured through coercion and duress because at the conference he was threatened by Mr. Gus Vorgias that if he refused to resign, he would go to jail. These threats were delivered to Petitioner by Mr. Vorgias in Greek, who was acting as a translator for and at the direction of Mr. Dangremond.

The Respondent claims that Mr. Dangremond advised the Petitioner in English that disciplinary action would be brought against him and Mr. Krinakis, but if they chose to avoid the possibility of such disciplinary action being on their personnel record, they could resign. This was allegedly translated into Greek by Mr. Vorgias. The record, however, does not substantiate this allegation since Mr. Vorgias' testimony is nowhere to be found therein. Respondent at no time advised Petitioner of the charges to be made or that he was entitled to have a representative of his Union present at the meeting. Furthermore, the record shows that at the time of the meeting Mr. Dangremond had not confirmed that railroad property had been involved in the previous day's incident, and, in fact, the bearings were later shown not to be Elgin property.

Following the confrontation with Mr. Dangremond, Petitioner sought to be reinstated in his employment with Elgin but his requests were denied on the ground that his resignation was voluntary, and, therefore, denied him any right to further employment. Thereafter, Petitioner obtained the assistance of his labor union which proceeded to prosecute a claim on his

behalf. On the property, the union argued that his resignation had been obtained by coercion and duress, and requested that he be reinstated with seniority rights unimpaired and that he be compensated for wages lost since his coerced resignation. On May 20, 1971, Mr. Kopp, Director of Labor Relations and the Chief Operating Officer of the railroad designated to handle such disputes denied Petitioner's claim.

On or about April 18, 1972, the Brotherhood of Maintenance of Way Employees, filed a claim on behalf of the Petitioner to the Third Division of the National Railroad Adjustment Board, realleging the arguments made during the grievance procedure. The hearing was conducted on written submissions of the parties, and no oral testimony given. In their written submissions the union argued that the Railroad had violated Rules 21(a) and 59(b) of the collective bargaining agreement. Rule 59(b) provides:

> "The right of any employee to have a duly authorized representative of the Brotherhood of Maintenance of Way Employees represent him in the handling of grievances under the recognized interpretation placed upon the schedule by officials of the railroad and the general committee is conceded."

Rule 21(a) provides:

> "An employee in the service thirty calendar days or more will not be disciplined or dismissed without first being given a fair and impartial hearing before an officer superior in rank to the officer preferring charges."

In support of Petitioner's claim of a coerced resignation the union relied on the affidavits of the Petitioner and Mr. Krinakis, which had been made a part of the record during proceedings on the property. Contrasting-

ly, the railroad in its submissions before the Third Division did not rebut or contradict the affidavits of the Petitioner or Mr. Krinakis, since Mr. Vorgias' affidavit or testimony was never submitted, nor made part of the record, and neither Mr. Lenhardt nor Mr. Dangremond could speak or understand Greek.

During the pendency of those proceedings, the Petitioner at no time received any notice from the Board regarding the time and place of their hearings. The ten man Board became deadlocked and the matter was then turned over to Mr. Irwin M. Liberman, Referee, who on January 10, 1973, issued his award on behalf of the Third Division of the National Railroad Adjustment Board denying the union's claim on behalf of the Petitioner. In issuing the award, Referee Miller found:

> 1). Rule 59(b) of the collective bargaining agreement required no mandatory action by the Carrier, and since the Petitioner had not asked for union representation at the confrontation with Mr. Dangremond, the rule was not violated.
>
> 2). Rule 21(a) required an impartial hearing only prior to discipline or dismissal and since this was a case of resignation and not dismissal, the rule was not applicable.
>
> 3). That although it was "quite probable" that all three versions of the conversation (that of Petitioner, Mr. Krinakis and Mr. Dangremond) regarding the resignation were correct, Petitioner's version was unsupported by other evidence; that Petitioner's unsupported statement was not sufficient to maintain his Burden of Proof, which in this type of case (coerced resignation) required proof "beyond a reasonable doubt."

In August, 1973, Petitioner filed the present action seeking, *inter alia*, review of the Adjustment Board award pursuant to Section 3, First (q) of the Railway

Labor Act (45 U.S.C. Section 153 First (q)). Count III of the complaint went beyond the review proceeding in alleging a conspiracy between the union and the railroad to deprive the Petitioner of his right to proper representation by the union. On December 7, 1973, the district court dismissed Count III as against Respondent railroad, stating that it was barred by the dismissal of the prior case for want of prosecution.

After submission of motions for summary judgment by both the Petitioner and Elgin, the District Court found that on the Petition for Review there was no deprivation of due process and the Award of the Third Division did conform and confine itself to matters within its jurisdiction, and finally that the record did not show any statutory grounds for reversing and/or remanding that Award; also the District Court dismissed Count III of Petitioner's Petition for Relief and Complaint, to the extent that it pertained to the Elgin Joliet and Eastern Railway Company. The District Court's order was in the form of a minute order with no memorandum opinion to explain the Court's reasoning in making its decision. This order was made final on April 26, 1974, and it is from this order that appeal was taken to the United States District Court for the Seventh Circuit.

On July 11, 1975, the U.S. Court of Appeals entered its judgment affirming the district court's decision.

REASONS FOR GRANTING THE WRIT

A.

In affirming the District Court's opinion, the Court of Appeals, effectively denied the Petitioner herein of his constitutional rights to procedural due process and equal protection of the laws. Although the National Railroad Adjustment Board is not statutorily bound to follow a particular standard of proof, they are bound, as are other administrative bodies, to conduct hearings in accordance with "fundamental principles of fair play and applicable procedural standards established by law", *Swift & Co., v. U.S.*, 308 F. 2d, 849 (C.A. 7, 1962).

In the case at bar, the referee discarded the established "preponderance of evidence" standard of proof established in civil cases and substituted in its stead the higher criminal standard, to wit, "proof beyond a reasonable doubt". Petitioner contends that imposition of this higher degree of proof here constituted a denial of equal protection of the law and simultaneously resulted in the loss of his employment without due process of law.

To establish his prima faciae case Petitioner submitted his affidavits which alleged that he was coerced into signing his resignation because of certain jail threats made to him in Greek by Mr. Gus Vorgias, the Railroad's agent. This assertion was corroborated by the affidavit of Mr. Krinakis. It is important to emphasize that in civil proceedings, once a prima faciae case is established the opposing party has the "burden of going forward" with the evidence. Therefore, the Respondent had the obligation of refuting the charge of coercion or if it failed to do so the allegation would stand. The only evidence which Respondent went forward with was the

testimony of its employee Mr. Dangremond, of what he allegedly said to Mr. Vorgias in English, which Mr. Vorgias was to translate into Greek. However, the record nowhere includes any statement from Mr. Vorgias as to what he said in Greek to Petitioner. This glaring failure of Respondent's duty of going forward with the evidence appears to have been glossed over by the Court of Appeals. The only reference made to this point was on Page 9 of the Opinion where the Court stated:

> ". . . Congress did not intend for the courts to maintain a check on each procedural and substantive ruling of the Board. Nowhere in the Railway Labor Act is the Board confined to a particular Standard of Proof."

Petitioner contends that as a matter of law, from the written submissions on the record, he complied with the "preponderance of the evidence" standard of proof and that the basis of his allegations of coercion (various threats received in the Greek language from Mr. Vorgias) were never refuted in the record. The imposition of the Referee of the criminal standard of proof was clearly erroneous and the imposition of such a standard without any valid reason, and contrary to the standard established in the vast majority of other hearings of the National Railroad Arbitration Board, amounts to a denial of equal protection of the laws.

In the case at bar, the existence of coercion by Respondent is determinative of other crucial issues. If coercion is in fact established by the record, then the resignation is nullified and the reasoning of the Referee as to the nonapplication of Rule 21(a) and 59(b) of the collective bargaining agreement must fall. If there was no resignation, then Petitioner was an employee of the railroad and the actions of the Respondent amounted to a unilateral discharge thereby requiring a "fair and im-

partial hearing" on the property under Rule 21(a). The denial of Petitioner's right to a hearing on the property, thus, would constitute a clear breach of the collective bargaining agreement, and entitle Petitioner to all the benefits of an employee, including the right to compensation for his wrongful discharge and subsequent pension rights. Thus, the question of establishing the existence of coercion is inexorably linked to the standard of proof established by the trier of fact as to the amount of evidence required to establish its existence. Petitioner contends that his allegations of coercion, supported by the Affidavit of Mr. Krinakis, and uncontradicted by anything in the record, was sufficient to establish the existence of coercion as a matter of law.

The Court of Appeals attempts to avoid the fundamental logical inconsistencies inherent in the Referee's decision on the ground that Congress did not expect courts to maintain a "check on each procedural and substantive ruling of the Board". (Appendix B p. 9 of Opinion) However, Congress has permitted review and reversal of Board decisions which are "totally without reason". Under 45 U.S.C. Section 153, First (q) Board decisions which are "without foundation in reason or fact" are considered to be outside the "matters within the scope of the division's jurisdiction", and, therefore, may be reversed on that ground. *Laday v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 422 F. 2d, 1168, 1171 (7th Cir. 1970). *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 415 F. 2d 403, 414 (5th Cir. 1969) or "wholly baseless and without reason", *Gunther v. San Diego & Arizona Eastern Railway Co.*, 382 U.S., 257, 261.

Petitioner contends that the Referee's decision denying the existence of a prima faciae case of coercion, where the record fails to show any direct rebuttal thereof is

"without foundation in reason or fact" and therefore reversible as being outside "matters within the scope of the division's jurisdiction".

B.

The notice requirement under 45 U.S.C., Section 153, First (J) states:

> "Parties may be heard either in person, by counsel, or by other representatives as they may respectively elect, and the several divisions shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Although the question of notice was not raised in the District Court, the Court of Appeals does have the inherent power to decide questions brought to their attention on appeal under the "plain error doctrine". *DeFonce Construction Co., v. City of Miami*, 256 F. 2d 425, (U.S.C.A. 5, 1958) see also *Kasper v. Kellar*, 217 F. 2d 744, (U.S.C.A. 8, 1955); *American Surety Co. of New York v. Coblentz*, 381 F. 2d 185 (C.A. 5th 1967).

It is Petitioner's contention that the affirmative requirement of 45 U.S.C. Section 153, First (J) stated above, has not been complied with in the case at bar. The record is completely devoid of the Board sending any notice to either the Petitioner or the union as to the time and place of the hearing before the Board. The failure to give such notice to the Petitioner is in direct violation of the Act and makes the Award invalid. *Illinois Central R.R. Co. v. Whitehouse*, 212 F. 2d 22, (C.A. Ill. 1954). The fact that Petitioner may have known that his grievance had been submitted to the Adjustment Board and that his union was representing him, does not excuse nor correct the statutory noncompliance of the Board for failure to give actual notice

to the Petitioner herein. By failing to give such notice to the Petitioner, he was precluded from attending and offering evidence in person to compliment the written submissions of his union.

Courts of Appeal have held that every person who may be adversely affected by an order of the Railroad Adjustment Board should be given reasonable notice of hearing, since the intent of Section 153 1st (J) is that no man should be deprived of his means of livelihood without a fair opportunity to defend himself. *Hunter v. Atchinson, T. & S. F. Ry. Co.*, 188 F. 2d 294, (C.A. Ill. 1951). It has also been held that the Board has a duty to give the unions and all workmen involved in the dispute before it, actual notice of hearings and the opportunity to file papers and be heard. *Missouri-Kansas-Texas R.R. Co. v. National Railroad Adjustment Bd.*, 128 F. Supp. 331 (D.C. Ill. 1954).

For the above reasons the Award of the Board No. 19556, entered in this cause is a nullity and should be set aside.

CONCLUSION

Wherefore, Triantafyllos Kotakis, Petitioner, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, in the above entitled case.

Respectfully submitted,

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APPENDIX A

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION
IRWIN M. LIEBERMAN, Referee

Award Number 19556
Docket Number MW-19707

PARTIES TO DISPUTE:
(Brotherhood of Maintenance of Way Employes
(
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM:
Claim of the System Committee of the Brotherhood that:

(1) The resignation of Kirk Yard Welder (Grinder) T. Kotakis (Account No. 67085) on October 1, 1970 was obtained through coercion and duress and it was thereby invalid (System File TG-2-70/VM-1-70).

(2) Welder (Grinder) Kotakis be reinstated with all rights unimpaired and compensated for all wage loss suffered because of the violation referred to within Part (1) of this claim.

OPINION OF BOARD:
Claimant was employed by Carrier in 1956. He was a Greek immigrant, having come to this country during World War II. On September 30, 1970 his position as a welder was abolished and he was to begin work as a grinder the following day. On the afternoon of September 30 Claimant accepted a ride in the

automobile of a fellow employee, Krinakis, for the purpose of returning certain welding equipment to a welding shop located some distance away, but still on the property. Krinakis was also Greek. While enroute to the welding shop, the car stopped and the men got out and picked up a large brass bearing (60 lbs) from the side of the road; while it was in their possession they were approached by Steel Company Security Guards and questioned. At this point Claimant "ran off" allegedly seeking an interpretor and upon returning found that everyone had left. The record indicates substantial conflict and contradictory statements concerning the details of the incident, however all parties would agree generally with the version above.

Claimant and Krinakis were advised to report to the office of the Division Engineer the following morning. What transpired in that office is in dispute. In addition to the Division Engineer, who acted as spokesman, there were two other company officers present, including one who acted as an interpretor. Claimant contends that they were told that they could resign or face criminal charges and jail. Carrier claims that they were told that a hearing concerning the incident would be held, or if they preferred to avoid the possibility of disciplinary action appearing on their personnel records they could resign. Both men signed resignations.

The Organization argues that the Carrier violated Rule 59 (b) by not informing Claimant of his rights under that Rule. The Rule reads:

> "The right of any employee to have a duly authorized representative of the Brotherhood of Maintenance of Way Employes represent him in the handling of grievances under the recognized interpretation placed upon the schedule by officials of the railroad and the general committee is conceded."

We do not agree. Rule 59 (b) required no mandatory action by Carrier; Claimant made no request for representation on October 1st.

Petitioner also alleges that Carrier violated Rule 21 (a) in not providing Claimant with a fair and impartial hearing. The Rule provides that an employee must have "due process"—an impartial hearing—prior to discipline or dismissal. Since we are dealing with a resignation rather than a dismissal, this argument begs the question and must be rejected.

The Carrier raises the issue that the Claim before the Board is not the Claim handled with the highest appeals officer on the property, and hence requests dismissal on procedural grounds. Since the facts upon which this claim is based are far from clear and unequivocal, we shall make no further comment on this matter, and proceed to the merits.

The crux of the matter is whether Claimant's resignation was obtained through coercion and duress. Claimant's guilt or innocence with respect to the alleged theft, and all other related issues, are immaterial. There are three versions of the conversation on the morning of October 1st. The Division Engineer stated:

> "I personally specifically told Mr. Kotakis and the other individual involved that a hearing concerning the incident would be held, or if they preferred to avoid the possibility of disciplinary action appearing on their personnel record they may resign. To insure that they understood, I had Mr. Vorgias repeat my statement in Greek, and again both men indicated that they chose to resign. Resignations were prepared and before they were signed I again asked them in English if they were sure this was what they wanted to do. Each answered in the affirmative to me as well as to Mr. Vorgias who repeated my statement in Greek. . . ."

Mr. Krinakis, by affidavit, reported the same conversation:

> "We were then taken to Mr. Danngerman, the chief engineer, and two forms were placed on the desk in front of us and the forms were blank. We were told that either we signed the forms resigning our jobs or else we would be fired and our records would show we were fired for stealing company property. We were told that if we resigned our records would be clear and no information would be given as to the reason for our resignations. If on the other hand we refused to resign, charges would be filed against us for theft and we would be fired and a hearing held before the union and our records would indicate that we were fired for stealing company property. This conversation was with Mr. Danngerman, the chief engineer of the E.J. & E. We signed the resignations and left the office."

Claimant reported the conversation as follows:

> "This is to advise all concerned on October 1, 1970, I, T. Kotakis, account No. 67085, while in the presence of company officials, was coerced into signing my name to a letter of resignation. This was done, when a company supervisor who acted as an interpretor, advised me in my native language if I did not sign my name to that letter of resignation, I would go to jail, and in my excitement I signed the letter."

In our opinion, it is quite probable that all three versions of the conversation are correct; the employees' versions represent what they "heard" that morning, under all the circumstances. The version by Claimant above is the only evidence presented to support the claim of coercion.

In Award #18476 we said:

> "It is the opinion of this Board that the burden of proof rests with the Organization to show beyond a

reasonable doubt that the Claimant was coerced into signing a letter of resignation and that he did so under duress on December 8, 1969. This cannot be established by inference . . . or by the confrontation of threatened disciplinary action as an alternative to his resignation."

Since this is not a discharge case where the Carrier must maintain the burden of proof, we look to Petitioner for support for the claim. Except for the unsupported statement of Claimant, we find nothing in the record to persuade us that the resignations were obtained through the use of coercion and duress.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claim shall be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: _____
Executive Secretary

Dated at Chicago, Illinois, this
10th day of January 1973.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 74-1558

TRIANTAFYLLOS KOTAKIS,
Petitioner-Plaintiff-Appellant,

v.

ELGIN, JOLIET & EASTERN RAILWAY CO.,
Respondent-Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—
No. 73 C 2131 WILLIAM J. LYNCH, *Judge.*

ARGUED FEBRUARY 25, 1975 — DECIDED JULY 11, 1975

Before FAIRCHILD, *Chief Judge*, CUMMINGS and SPRECHER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Plaintiff immigrated to this country from Greece during World War II. He was employed as a welder by the defendant from 1956 until October 1, 1970. On that day, he was to begin work as a grinder for defendant, a wholly owned subsidiary of United States Steel Corporation.

On the afternoon of September 30, plaintiff was riding in the automobile of a fellow employee, Steve Krinakis, allegedly to return certain welding equipment to defendant's welding shop. Krinakis' car became overheated.

While the car was cooling off at the side of the road, the men picked up from the edge of the road or adjacent weeds a large brass bearing that had evidently come from the Gary Works of United States Steel Corporation. That company's security guards intercepted the act and began to interrogate the two railroad employees. Assertedly because of difficulties with the English language, plaintiff left the scene in order to find a Greek-American to act as interpreter for himself and Krinakis. When plaintiff returned to the scene about ten minutes later without finding an interpreter, Krinakis and the security guards had left, so that plaintiff went home. He asked for and failed to receive permission to take the next day off.

On October 1, plaintiff and Krinakis were told to report to the office of R. V. Dangremond, the defendant's Division Engineer, concerning charges of attempted theft of company property. They appeared before Dangremond at 10:00 a.m. Welding Supervisor Lenhardt and Assistant Track Supervisor Vorgias were also present. Vorgias acted as interpreter.

According to plaintiff, Dangremond advised him and Krinakis that disciplinary charges would be brought against them unless they chose to resign. Plaintiff maintains that they were also threatened with criminal prosecution. At the conclusion of the meeting, the plaintiff and Krinakis signed letters of resignation.

The company representative's version of the crucial conversation differs somewhat from plaintiff's. According to R. V. Dangremond, the Division Engineer, plaintiff and Krinakis were specifically told:

> "that a hearing concerning the incident would be held, or if they preferred to avoid the possibility of disciplinary action appearing on their personal record they may resign. To insure that they understood, I had Mr. Vorgias repeat my statement in Greek, and again both men indicated that they chose to resign. Resignations were prepared and before they were signed I again asked them in English if they were sure this was what they wanted to do. Each answered in the affirmative to me as well as to Mr. Vorgias who re-

peated my statement in Greek. Mr. Kotakis and the other individual involved chose to resign voluntarily rather than face a hearing concerning their actions on September 30, 1970." (Plaintiff's Exhibit A-2).

Plaintiff subsequently sought reinstatement. When this was denied, plaintiff's labor union, the Brotherhood of Maintenance of Way Employees, prosecuted a grievance on defendant's property[1] on his behalf. The union argued that plaintiff's resignation was obtained by duress and requested appropriate relief. On May 20, 1971, defendant's Director of Labor Relations denied the claim.

On February 18, 1972, plaintiff's union filed a claim on his behalf with the Third Division of the National Railroad Adjustment Board, repeating the arguments made during the grievance proceeding. The union also alleged that the railroad violated Rules 21(a) and 59(b) of the applicable collective bargaining agreement.[2] To support plaintiff's claim of a coerced resignation, the union relied on the affidavits of plaintiff and Krinakis which were submitted in the grievance proceedings.

As frequently happens, the ten-man Third Division of the National Railroad Adjustment Board was deadlocked, so that the matter was submitted to Irwin M. Lieberman as referee pursuant to Section 3 First (l) of the Railway Labor Act (45 U.S.C. § 153 First (l). In deciding the controversy in favor of the defendant, the referee held that Rule 59(b) was not violated because it required no affirmative action by the carrier to secure a represen-

[1] Proceedings "on the property" describes the prosecution of grievances by an employee and his union before the company officers, without a third party. The quoted phrase is used to distinguish such proceedings from those which take place before the members of the National Railroad Adjustment Board.

[2] Rule 21(a) provides:
"An employee in the service thirty calendar days or more will not be disciplined or dismissed without first being given a fair and impartial hearing before an officer superior in rank to the officer preferring charges."
Rule 59(b) provides:
"The right of any employee to have a duly authorized representative of the Brotherhood of Maintenance of Way Employees represent him in the handling of grievances under the recognized interpretation placed upon the schedule by officials of the railroad and the general committee is conceded."

tative and because plaintiff made no request for representation at the October 1st meeting. The referee also held that Rule 21(a) had not been violated because it requires a hearing only when discipline or dismissal is imposed by the company and not when an employee resigns. The referee concluded that except for the "unsupported statement" of plaintiff, there was nothing in the record to convince him that the resignations were obtained through the use of coercion and duress. Therefore, the claim was denied by the Adjustment Board.

In 1971, plaintiff filed a complaint against defendant in the district court claiming that he had been discharged without good cause in violation of the collective bargaining agreement between defendant railroad and his union. On May 23, 1973, that suit was dismissed for want of prosecution.

In August 1973, plaintiff filed the present action seeking, *inter alia*, review of the Adjustment Board award pursuant to Section 3 First (q) of the Railway Labor Act (45 U.S.C. § 153 First (q)). Count III of the complaint went beyond the review proceeding in alleging a conspiracy between the union and the railroad to deprive plaintiff of his right to proper representation by the union. On December 7, 1973, the district court dismissed Count III as against defendant railroad, stating that it was barred by the dismissal of the prior case for want of prosecution.

On March 29, 1974, the district court granted defendant's motion for summary judgment with respect to Count I, which constituted plaintiff's petition for review of the Adjustment Board decision. See 45 U.S.C. § 153 First (q). Plaintiff had there alleged want of due process before the Adjustment Board, which he contended amounted to a failure of that Board "to conform, or confine itself to matters within the scope of the [Third] Division's jurisdiction." The minute order accompanying the district court's ruling stated:

> "The Court finds that the Record shows no deprivation of due process, as has been pleaded in Count I of the Petition for Review and Complaint. Further, the Court finds that the Award did conform and

> confine itself to matters within the scope of the Third Division's jurisdiction. Finally, this Court finds that the Record does not show any statutory grounds for reversing and/or for remanding that Award."

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the district court entered a final judgment for the railroad with respect to Counts I and III, resulting in this appeal.[3] We affirm.

I. Dismissal of Count I, the Petition for Review

In Count I of this complaint, plaintiff complained that the Third Division of the National Railroad Adjustment Board deprived him of due process of law because it "arbitrarily and capriciously denied petitioner's claim without recognizing substantial evidence in the record * * *." The burden of proof allegedly applied by the referee was also attacked. The award was said to be reversible as outside the Third Division's jurisdiction because "it is without foundation in reason or fact [and] wholly baseless and completely without reason."

In the opinion of the Board, Referee Lieberman properly observed that the crux of the matter was whether plaintiff's resignation was obtained through coercion and duress. Consequently, he decided that petitioner's guilt or innocence with respect to the alleged theft was immaterial. After excerpting Division Engineer Dangremond's, plaintiff's fellow-employee Krinakis' and plaintiff's own reports of the October 1st conversations in Dangremond's office, the Referee stated:

> "In our opinion, it is quite probable that all three versions of the conversation are correct; the employees' versions represent what they 'heard' that morning, under all the circumstances. The version by Claimant above is the only evidence presented to support the claim of coercion."

The referee then quoted from Third Division Award No. 18476 (1971), where an employee of the Union Pacific

[3] Count III was not dismissed as against plaintiff's union. Count II, claiming that the union breached its statutory duty of fair representation of plaintiff, was not involved in the Rule 54(b) disposition and therefore also still pends in the district court.

Railroad Company was attempting to rescind a written resignation that he signed rather than face a disciplinary charge. There the Board stated that the burden of proof rested with the employee's union to show "beyond a reasonable doubt" that he was coerced into signing a letter of resignation under duress, and that this cannot be established by inference or by the employer's threat of disciplinary action as an alternative to resignation. After thus quoting from Award No. 18476, Referee Lieberman concluded that nothing in the record indicated that petitioner's resignation was obtained through the use of coercion and duress except his unsupported statement. Therefore, the Referee was unpersuaded and the claim was denied.

In considering the judicial attack on this Third Division award, Section 3 First (q) of the Railway Labor Act is controlling. In pertinent part, it provides:

> "On such [district court] review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order * * *" (45 U.S.C. 153 First (q)).

This statute shows that the findings of the Board are conclusive except in three instances. Count I of the complaint does not charge that the Third Division failed to comply with the requirements of the Railway Labor Act or that there was fraud or corruption by a member of the Third Division. Instead, plaintiff argues that the Board's order was not confined to matters within the scope of the Third Division's jurisdiction. We disagree.

While plaintiff's complaint and his briefs in this Court seem to have muddled the two issues somewhat, we take his attack on the Board's refusal to allow his claim to be twofold: (1) the proceedings before the Board were lacking due process and (2) the Board's decision was "without foundation in reason or in fact." Lack of due

process is recognized as a legitimate ground for objection. See *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601, 616; *Edwards* v. *St. Louis-San Francisco Railway Co.*, 361 F.2d 946, 953-954 (7th Cir. 1966). There is also support for plaintiff's contention that the Board's order can be reversed by the courts if it is found to be "actually and undisputedly without foundation in reason or fact" (*Laday* v. *Chicago, Milwaukee, St. Paul, and Pacific Railroad Co.*, 422 F.2d 1168, 1171 (7th Cir. 1970); *Brotherhood of Railroad Trainmen* v. *Central of Georgia Railway Co.*, 415 F.2d 403, 414 (5th Cir. 1969)) or "wholly baseless and without reason" (*Gunther* v. *San Diego & Arizona Eastern Railway Co.*, 382 U.S. 257, 261). If a Board decision can be so characterized, it is viewed as outside the "matters within the scope of the division's jurisdiction" under 45 U.S.C. § 153 First (q). The parties take issue over which of the two phrases is the proper standard, but that question is immaterial to a disposition of this case because, when examined under either of the essentially equivalent standards, the Board's decision must be upheld.

On analysis, plaintiff is essentially asserting that the Third Division disregarded evidence submitted to it or misinterpreted that evidence and misinterpreted the provisions of the labor contract. However, in *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, *supra* at 263, the Supreme Court held that the courts may not open up the Board's finding on the merits because Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board. Likewise, this Court has already determined that a litigant cannot complain merely that an Adjustment Board award was based on insufficient evidence. *Edwards* v. *St. Louis-San Francisco Railway Co.*, *supra* at 952. *Gunther* and *Edwards* also make it clear that the interpretation of railroad collective bargaining agreements is for the Adjustment Board rather than the courts. 382 U.S. at 261-262 and 361 F.2d at 952. In view of these interpretations of the courts' power of review under Section 3 First (q), we cannot sustain plaintiff's attack on the merits of the award.

A. Due Process Based Attack

Plaintiff contends that the Referee's decision that Rules 21(a) and 59(b), *supra* n. 2, of the collective bargaining agreement had not been violated was clearly erroneous and deprived plaintiff of due process.[4] Under *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, *supra*, at 261-262, and *Edwards* v. *St. Louis-San Francisco Railway Co.*, *supra*, at 952, the interpretation of railroad collective bargaining agreements is for the Adjustment Board rather than the courts. Furthermore, the Referee's interpretation of the two clauses was clearly reasonable. Rule 21(a) does not apply to resignations. In asserting its application in his brief, plaintiff begs the question by assuming the resignation was coerced and therefore characterizing the termination of plaintiff as an employer disciplinary action to which Rule 21(a) should apply. Neither does Rule 59(b) apply to the October 1st office conference, for the grievance machinery under the collective bargaining argeement had not yet commenced, the employer has no obligation to suggest representation, and plaintiff had not sought to have a union representative present on that occasion. He was represented by his union when the grievance was processed on the property and before the Adjustment Board. Plaintiff's attempt to convert these two rulings, which are clearly within the exclusive power of the Adjustment Board, into violations of due process because of his disagreements therewith is rejected by this Court.

B. "Without Foundation in Reason or in Fact" Argument

Plaintiff contends that the Board ignored evidence in support of appellant's claim and that this evidence of coercion was unrebutted by any evidence of record. As noted earlier in this opinion, there were differing accounts of the crucial conversation in the record and the Referee found plaintiff's evidence of coercion unpersuasive. This is exactly the type of determination that Con-

[4] In both plaintiff's due process and "without foundation in reason or fact" attacks on the Board's decision, he first asserts that the Board was "clearly erroneous." Such a characterization adds nothing to plaintiff's two bases of attack, since it is clear that a court cannot employ the "clearly erroneous" standard in reviewing Adjustment Board awards. See 45 U.S.C. § 153 (q) quoted *supra*.

gress intended to be left to the Adjustment Board without judicial review. On the record in this case, it is impossible for us to say that the Board's decision was either "actually and undisputedly without foundation in reason or in fact" or "wholly baseless and without reason" and thus outside the matter of the Division's jurisdiction. See discussion *supra* at 7. Consequently, this claim of plaintiff must fail.

In his final attack under the "without foundation" argument, plaintiff asserts that the Referee wrongly chose to apply the beyond a reasonable doubt standard of proof.[5] It is unclear from his opinion that the Referee actually employed that standard, but, as already noted, this would not be an unprecedented act. Furthermore, assuming that the preponderance of evidence test was not but should have been applied, our study of the record before the Board satisfies us that the Referee could properly find that plaintiff did not prove coercion. Congress clearly intended that the awards of the Adjustment Board be as unassailable as those of an arbitrator. The Board was expected to exercise its expertise in matters of railroad labor disputes, and Congress did not intend for the courts to maintain a check on each procedural and substantive ruling of the Board. Nowhere in the Railway Labor Act is the Board confined to a particular standard of proof. Therefore, it would have been improper for the district court on the facts before it in this case to have invaded the province of the Board on the possibility that a burden greater than plaintiff desires was imposed.

C. *The Board's Alleged Failure to Give Notice to Plaintiff*

As to plaintiff's contention that the Adjustment Board award was a nullity for failure to provide him written notice of the Board's hearings under Section 3 First (j)

[5] Plaintiff relies on Section 556(d) of the Administrative Procedure Act (5 U.S.C. § 556(d)) as to the proper standard of proof. Except as to public information, this Act does not apply to Adjustment Board proceedings. See 5 U.S.C. § 551(1)(E); *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, Burlington & Quincy R. Co.*, 225 F.Supp. 11, 18 (D.D.C. 1964), affirmed *per curiam*, 331 F.2d 1020 (D.C. 1964), certiorari denied, 377 U.S. 918; *Stranford* v. *Pennsylvania R. Co.*, 155 F. Supp. 680, 688-689 (D. N.J. 1957).

of the Act (45 U.S.C. § 153 First (j)),[6] since Count I of the complaint does not attack the failure of the Board to give such notice and no such argument was made in the district court, it is not properly before us. Moreover, the record discloses that plaintiff knew his grievance had been submitted to the Adjustment Board and that he had authorized the union to represent him there. That satisfies the notice requirement. *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 327 U.S. 661, 666-667.

II. Dismissal of Count III, the Conspiracy Claim

Count III of the complaint alleges a conspiracy between the defendant and the union to breach the union's statutory duty of fair representation of the plaintiff and to deprive him of his rights under the collective bargaining agreement. Although not alleging a conspiracy, parallel allegations were made against the railroad alone in a 1971 suit entitled *Kotakis* v. *Elgin, Joliet & Eastern Railway Co.*, No. 71 C 2184 (N.D. Ill.) There the railroad was accused of having renewed its "decision to wrongfully discharge Plaintiff" on May 20, 1971, after plaintiff had pursued his grievance on the property. Apparently this lawsuit "forced" the union to represent the plaintiff before the Adjustment Board commencing on February 18, 1972.[7] Consequently, plaintiff did not pursue the 1971 suit and it was dismissed for want of prosecution on March 17, 1973. Under Rule 41(b) of the Federal Rules of Civil Procedure, this dismissal operated as an adjudication on the merits of the 1971 suit. Since Count III of the instant suit challenges essentially the same conduct by the defendant as was challenged in the earlier suit and seeks essentially the same remedy (only reinstatement is no longer sought), the adjudication on the merits unfavorable to the plaintiff of the first suit precludes a favorable decision here. Plaintiff will not be allowed to relitigate the propriety of the discharge, which is the only participation alleged as to the defendant in the conspiracy and which was the central thrust of the earlier

[6] Section 3 First (j) provides:
"Parties may be heard either in person, by counsel, or by other representative as they may respectively elect, and the several divisions shall give due notice of all hearings to the Employee or Employees and the Carrier or Carriers involved in any disputes submitted to them."

[7] See paragraph 39(b) of Count I.

suit. Consequently, the district court was correct in holding that Count III against the railroad was "barred by the order dismissing for want of prosecution the prior case filed by petitioner against the Railroad complaining of his discharge in Case No. 71 C 2184."

Judgment affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

45 U.S.C., Section 153 First (q)

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, *except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction,* or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

45 U.S.C., Section 153 First (J)

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all

hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

5th Amendment to the Constitution of the United States.

No person shall . . . be deprived of life, liberty, or property, without due process of law, . . .

14th Amendment to the Constitution of the United States, Section 1

. . . No State shall make or enforce any law which shall abridge the privileges and or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.